IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 104.—October Term, 1903.

THE GERMAN SAVINGS AND LOAN SOCIETY,

Plaintiff in error.

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,

Defendants in error.

PETITION FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

On behalf of The German Savings and Loan Society, plaintiff in error in this cause, we respectfully petition for a rehearing.

Upon a careful consideration of the opinion of the Court recently delivered by Mr. Justice Holmes, we confess to a degree of unusual disappointment, in that the legal proposition to which nearly all of our oral argument was directed has not been decided, nor even noticed by the Court. In view of the decision in our favor upon other points of the case, we feel assured that if the proposition to which we refer had been considered and determined by the Court, the case must have been decided in our favor.

For convenience of reference we append hereto a copy of the opinion of the Court.

The motion to dismiss for want of jurisdiction has been denied, and the motion to affirm upon the ground that

another question, non federal in character, was involved, sufficient in itself to sustain the judgment of the State Court has also been disposed of. The one remaining question upon which the case depends is the validity of the divorce in Kansas, recovered by F. M. Tull against Lucy A. Tull, the ancestor of the defendants in error; as said by the Court in the opinion, "if that divorce is valid, *his wife's* interest in his property was gone."

On the subject of this divorce, the opinion reads as follows:

"It is too late now to deny the right collaterally to im-
"peach a decree of divorce made in another State, by proof
"that the Court had no jurisdiction, even when the record
"purports to show jurisdiction and the appearance of the
"other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; S. C.,
"176 Mass. 92, 93. An attempt was made to avoid the au-
"thority of *Andrews* v. *Andrews* by the suggestion that
"there the respondent in the divorce suit had disappeared
"before the decree. But a respondent cannot defeat juris-
"diction by disappearing. Indeed in strictness only the
"attorney disappeared, and the respondent simply ceased
"to defend the suit. The effect given to the statute of
"Massachusetts in that case depended wholly on contradict-
"ing the record of the divorce suit and proving the want
"of jurisdiction by proving the libellant's want of domicil
"in the State."

The opinion then holds that there was some evidence to warrant the finding of the Supreme Court of the State of Washington as a fact that the husband had abandoned his residence in Kansas and changed his domicil to Washington before the divorce suit was commenced.

But at the oral argument it was urged as an independent and additional ground for sustaining the divorce that the wife had put in issue and litigated in the Kansas Court this very question of the fact of domicil, and it was pointed out that the Supreme Court of Washington had entirely overlooked the legal proposition that in such a case she and all persons claiming under her were concluded as to that issue of fact upon the principle of res adjudicata.

It is true that almost at the outset of the argument a

question was addressed to counsel by Mr. Justice Holmes as to whether the case of Andrews vs. Andrews was not determinative of this case; and reply was made by counsel to the effect that in the Andrews case the defendant had not appeared, or rather had appeared and had afterwards withdrawn her appearance; but it was not the intention of counsel to rest the distinction upon the mere fact of Lucy A. Tull having appeared by an attorney in the Kansas Court. The argument proceeded at great length thereafter, to the point that by an *answer* in the case, which was a denial of all the allegations of the complaint she had put in issue the allegation of the husband as to his domicil in Kansas, and that the judgment upon its face shows that the case, including of course this essential issue, had been heard, tried and determined in the Kansas Court.

The case chiefly referred to upon the argument was *Ellis vs. Ellis*, 55 Min. 401, and the cases therein cited. The doctrine of those cases is to the effect that the parties, husband and wife, may be concluded by a trial of issues of fact in which they have taken part, or by a decree of divorce, although the government may not be so concluded, and that in criminal proceedings the divorce may be held to be invalid.

It may be remembered that subsequently Mr. Justice White suggested to counsel whether his line of reasoning would not lead to the result that parties might appear in court and obtain a valid divorce by consent; and reply was made in substance that a judgment by consent is a judgment of the Court merely that the parties have consented, and does not involve judicial hearing and determination. In this connection *Cromwell vs. County of Sac.*, was cited to the Court and reference made to the rules of res adjudicata established in this Court and elsewhere by that decision. Reference was also made to an early English case followed by the Supreme Court of California in *Garwood vs. Garwood*, 29 Cal., 514, to the effect that two persons appearing before an ecclesiastical court in a proceeding *in rem*, and there litigating a question of fact, are afterwards concluded by the decision of that fact. It may be remembered also that counsel for plaintiff in error for the purpose of emphasizing the controlling and peculiar effect of res adjudicata, asserted that although no one

would pretend that a Court could marry two persons, it could accomplish that ultimate effect, at least so far as property rights are concerned, by an erroneous judgment in a suit for jactitation of marriage. That although in the church or the household, or in society two persons may not be in fact so divorced or married, yet in courts of justice where property rights are concerned they may, by force of res adjudicata, *be conclusively deemed to be* so married or divorced. In *Jeter vs. Hewitt*, 22 How., 352, 364, will be found the following: "So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the res judicata renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

As we have said, the opinion recently rendered does not even mention these legal propositions; we submit that they are sound in principle and are sustained by authority; if given effect they will be decisive of this case; and this consideration we urge as ground for rehearing.

In *Andrews vs. Andrews*, 188 U. S., apart from the Mass. Statute, the decision was in effect that the South Dakota divorce Court had no jurisdiction, because neither party was domiciled in that State. Following *Thompson vs. Whitman*, 18 Wall. and other cases, this Court held that when a sister state's judgment is presented, it is competent to inquire into the jurisdiction of the court. In that case in the Massachusetts Court the inquiry was at large. The first Mrs. Andrews was free to produce, and the Court free to receive, any competent testimony on the subject of domicil; whereas in this case the Constitution of the United States required the Supreme Court of the State of Washington to give full faith and credit to the Kansas judgment; and the Kansas judgment was decisive not only to the point that the marriage relation was thereby dissolved, but was decisive of the issue of fact there tried and determined, that the husband at the time of the proceeding was domiciled in Kansas.

In the case of *Werlein vs. New Orleans*, 177 U. S., 390,

397, in an opinion written by Mr. Justice Peckham, the judgment of the State Court was reversed becaused it failed to give full faith and credit to a prior judgment, used as evidence, in another suit between parties in privity with those who were parties to the former suit.

This case is clearly distinguishable from Andrews vs. Andrews and from any other case of divorce which has been before this Court. If in the case of Thompson vs. Whitman, 18 Wall., the owner of the oyster sloop had appeared before the Justices of the Peace and had litigated the fact upon which their jurisdiction depended, he would have been concluded as to that fact in this and all other Courts.

There is no exception to the rule of res adjudicata when applied to facts upon which the jurisdiction of a court depends. In the case of *Noble vs. Union River Logging Railroad,* 147 U. S., 165, 173, it was said: "There is another class of facts which are termed quasi jurisdictional, with respect of which facts the finding of the Court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties." Examples are then given; the Court concluding as follows: "And even if the Court be imposed upon by false testimony, its findings can only be impeached in a proceeding instituted distinctly for that purpose."

In *Volume 12 of the Encyclopedia of Pleading and Practice,* at page 211, will be found the following with a reference to a long list of authorities, to wit:

"Finding of Jurisdictional Facts—When jurisdiction "depends on a fact that is litigated in a suit, and such fact "is found in favor of the party who avers jurisdiction, the "question of jurisdiction is judicially decided and the judg-"ment record is conclusive evidence thereof until set aside "or reversed by a direct proceeding."

This case cannot be distinguished from *Fairchild vs. Fairchild,* 57 N. J. Eq. 678; 51 Am. St. Rep. 650; 34 At. Rep., 10.

In that case the wife, a resident of New Jersey, sued her husband in the Court of Chancery there for maintenance. He pleaded that he had obtained a divorce from the plain-

tiff in the State of Kansas. It appeared that the defendant, the husband, had obtained two decrees of divorce in that State, one in the County of Stafford, the other in the County of Hodgeman. In the Stafford County case the wife was never within the jurisdiction of the Court nor was she served with process, nor did she ever receive any notice of its pendency. In the Hodgeman County case the wife *appeared and made defense.* In the maintenance suit, the Chancery Court of New Jersey found that the husband "was not a bona fide resident of the State of Kansas, but that he went there solely for the purpose of instituting divorce proceedings against the respondent; and that neither the decree of divorce made by the District Court of Stafford County nor that made by the District Court of Hodgeman County was a bar to the suit." A decree was entered accordingly.

The Court of Errors and Appeals reversed the decree of the Chancery Court, holding that the Stafford County decree was void, but that the Hodgeman County decree must be sustained, because that court had jurisdiction over the parties, the respondent having voluntarily appeared and made defense to the action; and that the question of the bona fides of appellant's residence in Kansas was one for the exclusive consideration of the Kansas Court; "and "that decision unless procured by fraud, is conclusive not "only in Kansas, but in every other jurisdiction where the "validity of the judgment comes in question." The Court also held that under the Constitution of the United States full faith and credit must be given in New Jersey to the Kansas judgment.

At the oral argument the attention of the Court was further directed to another consideration, to wit: That in this proceeding the Kansas judgment is relied upon as a muniment of title to property; it may have such effect apart from its effect to dissolve the marriage relation. There can be no doubt as to the validity of the judgment in the State of Kansas, or as to its effect in that State upon the property rights of Mrs. Tull. Having appeared in the case, the judgment against Mrs. Tull is valid in personam; if it had directed the payment of money it could have been sued upon in another State. It is difficult to see why its

effect in Kansas upon the property of Tull does not accompany that property into the State of Washington where it was used *afterwards* in the purchase of real property (as distinguished from the purchase of a *contract*, deposited in escrow, giving the *right to purchase* real property).

And although it may be that a State will not permit the marriage status of one of its citizens to be interfered with by the Courts of a foreign state, it is surely not concerned with the property rights of its citizens, nor with their freedom to subject those rights to the determination of a foreign court.

In a divorce case the entire judgment may be received and given due credit as a legal judgment of a legal court, but the State may say that it will not recognize the efficacy of judicial power even when evidenced by a perfectly legal judgment, either to create or dissolve the marriage relation of one of its citizens.

That the questions here involved are of the highest public importance we submit without comment other than a reference to the opinion of Mr. Justice White in the Andrews case, 188 U. S. Divorces are generally followed by a subsequent marriage. If the validity of the new marriage and the wifehood of the wife, and the legitimacy of the children are forever open to collateral attack, and may depend from time to time, and under differing circumstances, upon such parol testimony as may be adduced, similar in character to that of F. M. Tull in this case, there would seem to be some cause for alarm.

We would also respectfully ask the further consideration by the Court of the following paragraph of the recent opinion.

"It is suggested that the invalidity of the judgment for "want of jurisdiction was not put in issue in the pleadings. "It is a sufficient answer that the Supreme Court of the "State treated it as an issue. Hill v. Mendenhall, 21 Wall. "453, relied on by the plaintiff in error, came from the Cir- "cuit Court of the United States, and when a case properly "is brought here from the Circuit Court upon constitu-

"tional grounds the whole case is open. Horner v. United "States, 143 U. S., 570. But it is otherwise when a case "comes, as this does, from a State Court. Osborne v. "Florida, 164 U. S., 650, 656; McLaughlin v. Fowler, 154 "U. S., 663; Murdock v. Memphis, 20 Wall. 590."

And we would respectfully *submit whether the* power and jurisdiction of the Court are not thus unduly restricted. The case of Murdock v. Memphis, 20 Wall. 590, referred to in the opinion, shows that after the act of 1867 was passed, it was contended that when this Court acquired jurisdiction at all through the existence of a Federal question, it acquired jurisdiction over the *whole case,* including questions of local law as well as Federal questions. By a divided Court this contention was overruled. But as we respectfully contend, although the jurisdiction of this Court extends only to a review of the decision of the Federal question, it includes a review of the entire case so far as it affects that question, and of every error of law committed by the State Court whether of legal procedure or otherwise, which has conduced to produce the erroneous result complained of.

In this case the plaintiff in error produced a sister State judgment and prayed that it be given full faith and credit. It was entitled to rely upon the established and still unquestioned local law of the State of Washington as to pleadings and evidence. When the pleadings were made up it was entitled to assume that so far as the foreign judgment was concerned, evidence of the domicil of Tull was unnecessary and inadmissible (although it might be admissible upon other issues. e. g. community property, brief page 24). The lower Court so held, but on appeal, without notice or opportunity to the plaintiff in error to produce testimony to the point, the Supreme Court attacks the foreign judgment upon a question of fact of domicil not put in issue or submitted by the parties for its consideration or determination. The Supreme Court then refuses faith and credit to the judgment, and without remanding the cause for a new trial or giving opportunity to be heard, it gives final judgment of the rights of the parties. Can it be said that under such conditions the sister State judgment has received full faith and credit? Can a State Court, while assuming to recognize and give full faith and

credit to the foreign judgment, deprive the party of all benefit thereby by some false or erroneous ruling of pleading or evidence? And in such case, is this Court powerless to grant relief?

In the case of *Werlein vs. New Orleans*, 177 U. S., supra, the validity and genuineness of the Federal Court judgment was not questioned, but the State trial Court thought it to be immaterial as applied to the issues in that case, and ruled it out of evidence. This error in the course of the trial in the State Court was finally brought here and reviewed. And this Court by Mr. Justice Peckham, said: "Whether full faith and credit have been given the judgment of a Federal Court by the Courts of a State is a Federal question, and that question exists in this case. Upon the merits we have simply to inquire whether the Courts below erred in their decision refusing to admit in evidence the judgment in the Chancery suit above mentioned."

The act of Congress of 1867 reads that a final judgment * * * where any title, right, privilege or immunity is claimed under the Constitution * * * may be re-examined * * * in the Supreme Court of the United States upon a writ of error * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States.

We, therefore, with due submission, question whether the case of Hill vs. Mendenhall, 21 Wall., 453, should be held inapplicable here because that case "came from the Circuit Court of the United States."

All of which is respectfully submitted.

W. S. GOODFELLOW,
E. C. HUGHES,
W. W. HINDMAN,
Counsel for Plaintiff in Error.

I certify that the foregoing petition is in my opinion well founded, and also that the same is not made or filed for the purpose of delay.

W. S. GOODFELLOW,
Of Counsel for Petitioner.

APPENDIX.

Supreme Court of the United States

No. 104.—October Term, 1903.

The German Savings and Loan Society, Plaintiff in Error, *vs.* Dora May Dormitzer, William L. Tull and Ernest B. Tull. } In error to the Supreme Court of the State of Washington.

[January 4, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Washington on the ground that full faith and credit has not been given to a decree of divorce rendered in the State of Kansas. (See 23 Wash. 132.) The record is long, but all that is material to the case in this court can be stated in a few words. The defendants in error are the children of one F. M. Tull, and brought a complaint for the purpose, so far as the Savings Society, the plaintiff in error, is concerned, of establishing their right to an undivided share in certain land in Spokane, Washington, to which the Savings Society claims an absolute title. At least that form of relief was held to be open under their complaint. Their claim was made on the ground that the land was community property of their parents and that they inherited an undivided share upon their mother's death. The Savings Society claimed under the foreclosure of a mortgage executed by F. M. Tull. Before the execution of their mortgage and after Tull had applied for a loan his wife died, and probate proceedings were instituted under which Tull purported to purchase his children's interest as a preliminary to making the mortgage. It has been decided that these probate proceedings were void as against a purchaser with notice and that the Savings Society took with notice. These are local matters with which we have no concern. But the Savings Society contended that it had a good title, irrespective of these proceedings. The land was purchased

with the proceeds of Kansas property which seems to have stood in the name of F. M. Tull. Tull procured a divorce in Kansas, and if that divorce was valid his wife's interest in his property was gone. Therefore, it is said, the land in Washington followed the character of the purchase money as his separate property, although before the payment was completed the divorced parties made up their differences and were married to each other a second time.

The Supreme Court of Washington, trying the case *de novo*, found that Tull had changed his domicil from Kansas to Washington before beginning his divorce proceedings, and therefore that the decree was without jurisdiction and void. It further found on evidence satisfactory to itself that, the divorce being out of the way, the property was joint or community property, and that his children had the right they claimed. With this last again we are not concerned, and the only question for us is whether the court could go behind the record of the Kansas case.

There is a motion to dismiss. It is said that the Federal question was not set up in the court below, and that the court put its decision on two distinct grounds, one of which was that the Society was estopped to deny the children's title. The latter ground, it is said, was independent of the Federal question. But the opinion of the court deals expressly with the constitutional rights of the Savings Society, and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock* v. *Mulvane*, 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property. The motion to dismiss is overruled. See *Johnson* v. *Risk*, 137 U. S. 300, 307.

On the merits, however, the plaintiff in error has no case. It is suggested that the invalidity of the judgment for want of jurisdiction was not put in issue in the pleadings. It is a sufficient answer that the Supreme Court of the State treated it as in issue. *Hill* v. *Mendenhall*, 21 Wall. 453, relied on by the plaintiff in error, came from the Circuit Court of the United States, and when a case properly is brought here from the Circuit Court upon constitutional grounds the whole case is open. *Horner* v. *United States*, 143 U. S. 570. But it is otherwise when a case

comes, as this does, from a State court. *Osborne* v. *Florida* 164 U. S. 650, 656; *McLaughlin* v. *Fowler*, 154 U. S. 663; *Murdock* v. *Memphis*, 20 Wall. 590.

It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the Court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39; *S. C.*, 176 Mass. 92, 93. An attempt was made to avoid the authority of *Andrews* v. *Andrews* by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed in strictness only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicil in the State.

It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question he had sold out his property and business in Kansas and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and therefore there was ground for the court to find that at that moment he changed his domicil to Spokane. The contract was made on December 28, 1886, and the libel for divorce in Kansas was not filed until February 25, 1887. There was evidence warranting the finding, and that being so we take the facts as they were found. *Egan* v. *Hart*, 165 U. S. 188.

Decree affirmed.

Mr. Justice McKENNA dissents.